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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/823,113  
Filing Date: April 13, 2004  
Appellant(s): ZELLER, BRUCE K.

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Laura J. Zeman  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 11/27/2007 appealing from the Office action mailed 6/16/2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

Appellant's brief presents arguments relating to whether Appellant has properly perfected their claim for priority (i.e., whether the Nierop reference is available as prior art). This issue relates to petitionable subject matter under 37 CFR 1.181 and not to appealable subject matter. See MPEP § 1002 and § 1201.

**WITHDRAWN REJECTIONS**

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner:

Claims 25-27 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-3 of U.S. Patent No. 6,863,182.

Claims 22 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Bane (US 359,659).

### **(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

### **(8) Evidence Relied Upon**

2004/0020830	Nierop	2-2004
1,005,907	Wall	10-1911

### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

#### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 22, 24-25 and 27 are rejected under 35 U.S.C. 102(e) as being anticipated by Nierop (US 2004/0020830).

Regarding claims 22 and 25, Nierop (Fig. 1-4) teaches

a frame for separating excavated material comprising a base having a front wall (34), two side walls (fig. 2, sides perpendicular to front wall) and two horizontal side bars (beneath side walls) extending backward from opposite sides of a bottom of said front wall;

at least one vertical bar member (20b) extending vertically upward from a top of each of said horizontal side bars at an end of said horizontal side bars opposite said front wall (Fig. 1, 2);

and a grate (14) rigidly secured to and extending from a top of said vertical bar members to a top of said front wall such that said grate forms less than a ninety degree angle relative to a ground surface (Fig. 1, 2).

Regarding claims 24, 27, at least one flange (Fig. 3, 3a, near 40) extending downward from a bottom of said grate. Further, Applicant is respectfully reminded that claim language consisting of functional language and/or intended use phrasing is given little, if any, patentable weight as the apparatus must merely be capable of functioning, or being used, as claimed. See MPEP 2112.02, 2114. Here, the structures cited above are certainly capable of facilitating engagement with a bucket of a loader/backhoe. Further, it is noted that the claim language "from a top" is interpreted as extending from an area near the top, thus a bar extending "from a top" is not regarded as required to be directly physically connected to the "top".

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 23 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nierop in view of Wall (US 1,005,907).

Nierop as set forth above teaches all that is claimed except for expressly teaching at least one support bar extending from a top of each of said horizontal side walls to a mid-length of said grate on opposite sides of said grate. This feature, however, is well-known in the support arts. For instance, Wall teaches a support structure for a screen that uses this type of support (Fig. 1, 2 support b4). Moreover, this additional bracing serves the common-sense purpose of providing additional support for the screen structure. Therefore, it would have been obvious at the time the invention was made to a person having ordinary skill in the art to modify the invention Nierop as taught above to achieve additional support for said grate.

**(10) Response to Argument**

Appellant's initial argument that Nierop is not available as prior art is undermined by a review of the record. In the Final Rejection (dated 6/16/2006), Appellant was informed that the priority of the instant application only extends to August 26, 2002 as

Appellant had not properly stated the relationship between applications 10/227,993 and 09/503,823. Appellant then failed to properly perfect their claim and was informed of such by Examiner in the Advisory Action (dated 10/05/2006; citing MPEP 201.11(d); 37 CFR 1.78(a)). Thus, as Appellant has still failed to take the proper steps to perfect their claim for priority, the Nierop reference is regarded as available prior art. Further, as noted above, this issue relates to petitionable subject matter under 37 CFR 1.181 and not to appealable subject matter.

Appellant's argument that Nierop fails to disclose a grate rigidly secured to and extending from the top of the vertical bar member is undermined by a review of the prior art. Nierop teaches the grate member (14) firmly seated on a rigid frame (Fig. 1, 2; para. 16 teaching rigid frame members 16, 20, 30). As prior art is interpreted as broadly as reason allows, it is not unreasonable to regard the grate member as firmly secured as Nierop teaches that the surrounding frame structure is rigid and the device itself relies on the grate being rigidly held during screening (para. 15 teaching a rigid screen mounted on top of a rigid support frame). In view of Nierop's express teachings, the use of a hinge connection to connect a top portion of the grate can be simply be regarded as another means that assists in forming a rigidly secure connection. Consequently, as Appellant's arguments are undermined by a review of the prior art, the claims should stand rejected.

Appellant's argument that Examiner has failed to establish a prima facie case of obviousness is misplaced. Here, it is noted that Appellant contends that the prior art fails to teach or suggest the claimed combination. This legal test, however, is but one

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way of establishing obviousness. See MPEP 2143. Moreover, Examiner need not satisfy this specific test to prove obviousness, especially in the instant case where the prior art teaches the claimed feature of a bracing support that provides the common-sense benefit of providing additional support. Further, Appellant has failed to properly traverse or explain why the mere addition of a support bracing would not be obvious. Instead, Appellant's rebuttal consists of the contention that a long felt need exists, but Appellant has failed to provide any supporting evidence. See MPEP 2145. Consequently, as Appellant has failed to properly traverse the finding of obviousness, the claims should stand rejected.

For the above reasons, it is believed that the rejections should be sustained.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

Respectfully submitted,

/Joseph C Rodriguez/

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